No. 80-1095

Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1980

MAURICE E. BAKER
LAWRENCE F. DAUM
ELTURINO L. LOIACONO
OLIVER W. PERRY
WESLEY A. WRIGHT, JR.
THOMAS E. YOUNG
Petitioners,

v.

THE UNITED STATES
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED

1. Was the Director of Central Intelligence empowered to terminate petitioners' employment under section 102(c) of the National Security Act of 1947 (termination "in the interests of the United States"), where the sole reason for termination was that petitioners were "surplus to the Agency," and where it was not alleged that their continued employment involved a security risk?

2. Could a CIA personnel regulation implementing section 102(c) of the National Security of 1947, to terminate employees declared "surplus to the Agency," validly deprive petitioners of preferences, rights and procedures conferred by the Veterans' Preference Act of 1944?

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners respectfully pray that a writ of certiorari issue to review the Order and Opinion of the United States Court of Claims entered July 18, 1980, rehearing denied October 3, 1980.

OPINION BELOW

The unreported Order and Opinion of the United States Court of Claims appears in the Appendix, *infra,* pp. 1a-4a.

JURISDICTION

The Order and Opinion of the United States Court of Claims, dismissing the petition, was entered July 18, 1980. A Motion for Rehearing *en banc,* timely filed, was denied October 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1) (1976).

STATUTES AND REGULATIONS INVOLVED

The statutes involved are the National Security Act of 1947, § 102(c), 50 U.S.C. § 403(c) (1976), and 5 U.S.C. § 3502 (1976) (amended 1978) (originally enacted as Veterans' Preference Act of 1944, ch.287, § 12, 58 Stat. 390). The regulation involved is a CIA Headquarters Regulation, H.R. 20-27, revised March 31, 1980 (rescinded 1977). The statutes and regulation are set forth in the Appendix, *infra,* pp. 6a - 11a.

STATEMENT OF THE CASE

Background

Petitioners are former employees of the Central Intelligence Agency (CIA) who were separated pursuant to a CIA Headquarters Regulation, H.R. 20-27, revised March 31, 1970, entitled "Separation of Surplus Personnel." This regulation was promulgated by CIA to establish procedures by which any of its employees could be declared excess to manpower requirements and terminated as "surplus to the Agency" under the exclusive authority of section 102(c) of the National Security Act of 1947, 50 U.S.C. § 403(c)(1976).[1]

[1]Section 102(c) provided, in pertinent part: "Notwithstanding . . . the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States . . ."

Prior to being declared excess, each petitioner was employed in a directorate of CIA. All were honorably discharged veterans. None was engaged in foreign intelligence gathering or espionage activities.

Petitioners' declarations of excess were part of an Agency-wide reduction in force initiated by then Director James R. Schlesinger. Five of the six petitioners were declared excess in March, 1973.[2] CIA personnel reductions were reported by the press to be "the largest personnel cutback in the history of the [A]gency." *Schlesinger Sets Large Cutbacks In CIA Personnel,* Evening Star and Daily News, March 21, 1973, at A-2. The personnel reductions were announced to Agency employees in Headquarters Employee Bulletin No. 342, dated March 26, 1973. The Bulletin reported that CIA was declaring approximately 700 employees excess. It added:

> This activity is necessary to supplement the normal attrition to achieve the required personnel levels in [Fiscal Year] 1974. Employees have been selected to be declared excess because their functions or skills in the Agency are no longer applicable. *Further, it will continue to be Agency policy to declare excess those employees whose skills are no longer required if such employees cannot be retrained to perform other duties.* (emphasis in original).

The personnel reductions initiated by Schlesinger in early 1973 eliminated an estimated 2,000 jobs over the course of several years. *See* N.Y. Times, February 23, 1979, at A-20.

CIA is still separating surplus personnel. Although a new regulation, H.R. 20-27, dated March 17, 1977, is used,

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[2]Petitioner Loiacono was declared excess in January, 1974.

section 102(c) remains the sole statutory authority for such terminations. In an action widely referred to in the press as the "Halloween Massacre," CIA Director Stansfield Turner declared 212 employees excess on October 31, 1977, as part of a two-year exercise to eliminate 820 positions. *See, e.g., Turner Very Optimistic About CIA's Future,* Washington Star, February 5, 1980, at A-5.

Administrative Proceedings

After being declared excess, petitioners Wright and Young, pursuant to H.R. 20-27b(2), appealed to the CIA Director of Personnel, who reviewed their appeals and recommended termination of employment. Pursuant to H.R. 20-27(b)(4), Wright and Young appealed to the Director of Central Intelligence, who reviewed their appeals and terminated their employment as "suplus to the Agency," effective as to Young on July 7, 1973 and as to Wright on July 8, 1973.

Petitioners Baker, Daum, Loiacono, and Perry were similarly declared excess but did not utilize the pre-termination appeals procedure provided in H.R. 20-27b(2) *et seq.* Two of the petitioners retired in lieu of termination, effective June 29, 1973 as to Baker and June 30, 1973 as to Perry. The other two petitioners resigned in lieu of termination, effective June 30, 1973 as to Daum and October 25, 1974 as to Loiacono.

Court Proceedings

Petitioners filed in the United States Court of Claims on June 28, 1979, claiming back pay and collateral relief on the ground that their removals or threatened removals under section 102(c) were unlawful. Petitioners alleged, *inter alia,* that they had been wrongfully deprived of

preferences, privileges and considerations to which they were entitled under the provisions of other laws, including the Veterans's Preference Act of 1944, as amended. Jurisdiction in the Court of Claims was based on 28 U.S.C. § 1491 (1978 Supp.)

Respondent raised affirmative defenses, *inter alia,* that petitioners had failed to state a claim within the jurisdiction of the court and upon which relief could be granted. The court suspended further proceedings pending the filing of a dispositive motion by respondent.

Respondent filed a Motion for Summary Judgment on November 23, 1979, arguing that dismissal was or would have been proper under section 102(c) of the National Security Act of 1947 for three basic reasons: (1) the "notwithstanding any other law" clause of section 102(c) clearly pre-empted the Veterans' Preference Act, or any other statute; (2) Congress had granted CIA power to formulate its own personnel policies, independent of and unaffected by the Veterans' Preference Act or any other statute; and (3) the Director of Central Intelligence had properly determined that "the interests of the United States" were implicated, because the removal of surplus personnel was in the interests of Government.

Petitioners filed a Response on February 4, 1980, with three basic arguments to support their claim that termination of surplus personnel was outside the scope of section 102(c): (1) it was implicit on the face of the statute that the exceptional dismissal power of section 102(c) was limited to special cases; (2) the available legislative history clearly indicated a Congressional purpose that section 102(c) was to be used only for terminating security risks; and (3) laws in *pari materia* with section 102(c) had been understood and applied to refer specifically to security risks. Respon-

dent's arguments were answered as follows: (1) the "notwithstanding" clause of section 102(c) only applied where a removal was authorized "in the interests of the United States;" (2) CIA had no power to enact a personnel regulation which exceeded statutory authority; and (3) removals were not "in the interests of the United States" where they were *prima facie* related to a reduction in force, and did not specifically involve security interests of the Agency.

On July 18, 1980 the court below granted respondent's motion and dismissed the petition. It held that petitioners had failed to state a claim upon which relief could be granted, for the sole reason that the scope of section 102(c) and a predecessor regulation had been raised and broadly interpreted in *Rhodes* v. *United States,* 156 Ct. Cl. 31 (1962), *cert. denied,* 371 U.S. 821, to give the Director of Central Intelligence "absolute right to terminate any employee whenever he deemed it necessary or advisable." 156 Ct. Cl. at 36 (1962). The opinion also noted that Congress had granted CIA authority to formulate its own personnel policies consistent with its unique needs and specialized functions, citing *Pittman* v. *United States,* Ct. Cl. No. 41-78 (decided June 22, 1979).

A motion for Rehearing *en banc* was denied on October 3, 1980, without opinion.

REASONS FOR GRANTING THE WRIT

The issues presented by this case raise questions of fundamental importance to the exercise of executive power over thousands of CIA employees. Petitioners were terminated outside the protections and procedures generally applicable to removal of federal employees. The decision below permits the Director of Central Intelligence to so terminate any employee by declaring simply that he is

"surplus to the Agency." It deprives petitioners of the retention preferences and rights conferred by law on preference-eligible employees.[3]

The issues, which this Court is asked to decide for the first time, arise from CIA's exercise of the unreviewable dismissal authority granted by section 102(c) of the National Security Act of 1947, 50 U.S.C. § 403(c) (1976). This authority, by its terms, is an exception to general personnel laws – the Lloyd-La Follette and Veterans' Preference Acts – which limit an agency head's control over removals. The major thrust of respondent's argument below conceded that petitioners' removals were valid only if section 102(c) was controlling. The principal question is whether petitioners' removals were authorized under that statute.

Petitioners' challenge is not premised upon any "right" to federal employment, but upon the considerations and procedures enacted by Congress for the benefit of preference-eligible veterans. Neither do petitioners contend that CIA lacked substantive authority to discharge them. Section 102(c) is not the only source of authority to dismiss CIA employees. The stated reason for petitioners' removals ("excess to manpower requirements") was recognized as a justifying circumstance for separations

[3]All petitioners were covered by the provisions of the Veterans' Preference Act of 1944, as amended. *See* 5 U.S.C. § 3502 (1976) (amended 1978), as to retention preferences applicable to a reduction in force. The statute is set forth in the Appendix, *infra*, p. 6a. The Civil Service Commission Regulations defining a reduction in force are set forth, *infra*, at p. 8.

under normal termination procedures as early as 1948.[4] Thus, the question is not whether CIA employees *can* be separated as "surplus to the Agency" but only whether the special dismissal power of section 102(c) is available.

I. The Court Below Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled By This Court.

Section 102(c) of the National Security Act of 1947 provides, in pertinent part, that "the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever

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[4]The regulations of the Civil Service Commission enacted during 1948 contained the following definition of reduction in force:

> 'Reduction in force' means the involuntary separation from the rolls of a department, or furlough in excess of thirty days, of one or more employees in order to reduce personnel. *Reduction in personnel may have to be made because of lack of funds, personnel ceilings, reorganization, decrease of work, to make a position available for a former employee with established reemployment or restoratio rights, or for other reasons . . . 5 C.F.R.* § 20.2(2) (1949) (emphasis added).

The emphasized clause was omitted in the 1953 revision of the regulations. The substance of the emphasized clause was reinstated in the 1957 version of the regulations, which read as follows:

> 'Reduction in force' is the release of an employee from a competitive level by means of separation from the rolls, furlough for more than thirty (30) days, reassignment involving displacement, or change to lower grade; *when such actions are caused by lack of work, shortage of funds, reorganization, or exercise of regulatory reassignment or reemployment rights.* 5 C.F.R. § 20.2(a) (1957) (emphasis added).

See Ritter v. *Strauss,* 261 F.2d 767 (D.C. Cir. 1958), for a discussion of the history of these revisions.

he shall deem such termination necessary or advisable *in the interests of the United States.*" 50 U.S.C. § 403(c) (1976) (emphasis added).

The court below held that the language was unlimited in application. Petitioners submit that the statute is expressly limited by the proviso "in the interests of the United States." Whatever these words mean, it is apparent that Congress intended the statute to have a limited purpose.

In interpreting section 102(c), it is important to note that the dismissal authority contained therein was not the only source of authority to terminate employees. CIA had the same inherent power to terminate employment as other agencies and departments of Government. *See Myers* v. *United States,* 272 U.S. 52 (1926); *Bailey* v. *Richardson,* 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam,* 341 U.S. 918. Thus, section 102(c) was additional termination authority.[5] As express termination authority, it differed from the unexpressed removal power implicit in the Agency's organizational statute. Moreover, the "notwithstanding" clause of section 102(c) conferred unreviewable dismissal power. As such, it was an exception to the general personnel laws which governed the discharge of federal employees.

If Congress intended section 102(c) to have such a broad meaning that termination of all CIA employment could be said to implicate "the interests of the United States," the result would be that the statute, though in form an exception to the general personnel laws, could be used indiscriminately to supersede those laws. The court below

[5]The CIA Act of 1949, 50 U.S.C. § 403j(a) (1976), authorizes the hiring of employees to carry out the functions of the CIA. The Director has general power to terminate employment under this Act. Section 102(c) of the 1947 Act gives additional termination authority.

intimated that this was so. Such a fundamental issue is surely for this Court to decide.

In enacting the Lloyd-LaFollette and Veterans' Preference Acts, Congress limited executive control over removals. In enacting section 102(c) of the National Security Act of 1947, Congress carved out an exception to the limitations created by the Lloyd-LaFollette and Veterans' Preference Acts. In creating an exception to those rights, Congress had the power to limit the exception as it previously had the power to create the rights thus excepted to. Section 102(c) is limited on its face to the termination of employment "in the interests of the United States." Presumably, Congress meant something specific by these words.

Petitioners contend that their removals for the stated reason — excess to manpower requirements — were not within the exception created by section 102(c). If their removals were not within the exception, they were entitled to all the preferences, considerations, and procedural rights provided by the Veterans' Preference Act. In attempting to place itself within the exception, respondent argued below that "the interests of the United States" were implicated by the fact that terminating surplus personnel was in the interest of Government. But surely the language "in the interests of the United States" meant something more than the interests of Government. Otherwise, the extraordinary dismissal authority of section 102(c) could be used for ordinary reasons.

The legislative history of section 102(c) clearly demonstrates that Congress intended it to be specific authority for terminating security risks. In the court below, petitioners presented legislative history by affidavit of a living witness who attended hearings on the intelligence provisions of the 1947 Act held in executive ses-

sion.[6] *See* Plaintiffs' Response to Motion for Summary Judgment, Exhibit "G" (Affidavit of Walter L. Pforzheimer[7]), *Baker et al.* v. *United States,* Ct. Cl. No. 276-79C (rehearing denied October 3, 1980). The subject of security risks arose during the testimony of then Director of Central Intelligence Hoyt S. Vandenberg before the House Committee on Expenditures in the Executive Branch.[8] At that time, one or more members of the Committee observed that the Director of Central Intelligence needed special power to terminate security risks. *See* Affidavit of Walter L. Pforzheimer, *supra,* ¶ 5. There followed a discussion of the security risks presented by persons who were homosexuals, those who overindulged in the use of alcohol, and those who were prone to discuss classified information. *Id.* The unanimous consensus of the Committee was that the legislation should contain special termination authority for the Director to deal with such security risks. *Id.* In response to the Committee's stated wishes, termination language was drafted which became section 102(c) of the National Security Act of 1947. The language was copied from the so-called McCarran Rider, which had been passed by Congress a year earlier as part of the 1947 State Department Appropriations Act. *Id.,* ¶ 6.

The language of the McCarran Rider was as follows:

> Notwithstanding the provisions of section 6 of the [Lloyd-LaFollette Act], or the provisions of

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[6]No explanation of the purpose for section 102(c) appears in the published hearings, committee reports, and floor debates on the National Security Act of 1947.

[7]At the time, Pforzheimer was in charge of Congressional relations for the Central Intelligence Group (CIG), predecessor to the CIA.

[8]This Committee was the predecessor to the present Government Operations Committee. The Committee's calendar does not refer to hearings on this legislation (HR 4214) held in executive session.

> any other law, the Secretary of State may, in his absolute discretion, on or before June 30, 1947, terminte the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable *in the interests of the United States,* but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission. 60 Stat. 458 (1946) (emphasis added).

The McCarran Rider was re-enacted in each subsequent Appropriations Act until 1953.[9]

It is clear that the State Department viewed the McCarran Rider as specific authority for removing security risks. The State Department promulgated personnel regulations in 1949 and in 1951 which dealt with the exercise of termination authority under the McCarran Rider. The 1949 Regulations stated that it was "highly important to the interests of the United States that no person be employed in the Department who is disloyal or who constitutes a security risk." U.S. Department of State, Manual of Regulations and Procedures (1949), § 391.1, discussed at 354 U.S. 374. The 1951 Regulations stated that the procedures for handling security cases were promulgated under the authority of the McCarran Rider. U.S. Department of State, Manual of Regulations and Procedures (1951), Vol. I, § 391.3, entitled "Security Authority," discussed at 354 U.S. 376. In the spring of 1950, the State

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[9]The legislative history of the McCarran Rider was discussed in *Service* v. *Dulles,* 354 U.S. 363 (1957), a case involving termination of a security risk.

Department submitted to Congress a comprehensive report on the procedures and standards it used for handling employee loyalty and security cases. The report contained the following language:

> [E]ffective during the 1947 fiscal year, and each fiscal year thereafter, the Department considered the McCarran Rider as an additional standard for dealing with security problems in the Department . . . S. Rep. No. 2108, 81st Cong., 2d Sess., p. 15, discussed at 354 U.S. 378.

It is also clear that Congress understood the language of the McCarran Rider to refer specifically to security risks. Numerous references to the McCarran Rider appear in committee reports and floor debates on the Summary Suspension Act of 1950, 64 Stat. 476.[10] Both the House and Senate Reports on the 1950 Act contain the following statement:

> The Secretary of State is empowered to remove employees . . . who are security risks under [the McCarran Rider]. H.R. Rep. No. 2330, 81st Cong., 2d Sess., p. 3; S. Rep. No. 2158, 81st Cong., 2d Sess., p. 2.

During the floor debates, the McCarran Rider was referred to as specific authority for terminating three kinds of security risks, namely, employees who indulged in "too much liquor," those who were "sex perverts" and those who

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[10]This Act authorized the heads of specified federal agencies, including the Secretary of State, to suspend employment "when deemed necessary in the interest of national security" and to terminate employment when determined to be "necessary or advisable in the interest of the national security of the United States." The Act expressly provided that these powers existed, notwithstanding any other personnel laws.

were "too loquacious and too garrulous." 96 Cong. Rec. 10017.

Congress has expressly limited the scope of other summary dismissal statutes using the phrase "in the interests of the United States.". For example, there is similar authority for terminating National Security Agency personnel. The Internal Security Act of 1950 provides as follows:

> Notwithstanding sections 7512 and 7532 of title 5, or any other provision of law, the Secretary [of Defense] may terminate the employment of any officer or employee of the Agency whenever he considers that action to be *in the interest of the United States,* and he determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security. Such a determination is final. 50 U.S.C. § 833(a) (1976) (emphasis added).

It is clear from this statute that Congress understood the words "in the interest of the United States" to refer specifically to considerations of national security.

In *Cole* v. *Young,* 351 U.S. 536 (1956), a former government employee challenged his dismissal under the Summary Suspension Act of 1950. This Court ruled that the Act must be narrowly construed so that its summary procedures, which eliminated the procedural rights of employees provided by the Veterans' Preference Act, would not be extended beyond the purpose for which Congress made an exception to those rights. In reviewing the legislative history of the 1950 Act, this Court observed that it stemmed from similar, and limited, summary dismissal powers which Congress had, at various times since 1942, granted to certain "sensitive" agencies of the

Government, namely the military departments[11] and the State Department (McCarran Rider). 351 U.S. at 548, n.8. Thus, this Court has recognized that the McCarran Rider and the 1950 Act were in *pari materia.*

Since the termination language of section 102(c) is based on the McCarran Rider,[12] the language ("in the interests of the United States") should likewise be narrowly construed to limit unreviewable dismissal authority to the minimum scope necessary to achieve the apparent objectives of Congress, namely, the removal of security risks. This intent of Congress is manifest in the history of the law, in the common understanding of the words "in the interests of the United States" as evidenced by considered administrative interpretations of the McCarran Rider and subsequent Congressional re-enactment, and in Congressional use of the same language in other summary dismissal statutes. All of these factors urge the same conclusion, namely, that the statute cannot be applied where the reason for dismissal does not involve CIA security interests.

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[11]56 Stat. 1053 (1942) gave war-time powers to the Secretaries of the Army and the Navy. The statute provided, *inter alia,* that "the provisions of [the Lloyd-LaFollette Act] shall not apply to any civil-service employee . . . whose immediate removal is . . . warranted by the demands of national security." 63 Stat. 1023 (1950 Appropriation Act for the Military Establishment) extended summary dismissal power over civilian employees to the Secretaries of Defense and the Air Force.

[12]In *Rhodes* v. *United States,* 156 Ct. Cl. 31 (1962), *cert. denied,* 371 U.S. 821, a case challenging a section 102(c) dismissal on procedural grounds, the Government expressly recognized that the McCarran Rider and section 102(c) were in *pari materia. See* Defendant's Motion for Summary Judgment at 7, *Rhodes* v. *United States, Ct. Cl.* No. 341-60 (certiorari denied 1962).

II. The Court Below Has Decided Federal Questions in a Manner in Conflict with *Applicable Decisions of this Court*

The court below held that H.R. 20-27 was a justified use of Section 102(c) dismissal authority. In so holding, it acted contrary to the principles enunciated by this Court in *Cole* v. *Young,* 351 U.S. 536 (1956). That case explained:

> When the President expressly confines his action to the limits of statutory authority, the validity of the action must be determined solely by the congressional limitations which the President sought to respect,. . . *Id.* at 557, n. 20.

By citing *Pittman* v. *United States,* Ct. Cl. No. 41-78 (decided June 22, 1979), the decision below intimated that CIA's executive powers were involved. The executive powers discussed in *Pittman* were those stemming from specific Congressional exemption of CIA from provisions of the Classification Act of 1949.[13]

The case at bar is distinguishable from *Pittman* because it involves the exercise of statutory power. *Pittman* involved regulatory power.[14] It is clear from the face of H.R. 20-27 that the Director of Central Intelligence pro-

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[13]That Act authorized the classification of positions in the departments and agencies of Government, as to duties, responsibilities, and qualification requirements, and established compensation schedules and rules, but by its terms did not apply to the CIA. The exemption is codified at 5 U.S.C. § 5102(a)(1)(vi) (1976), as to classification of positions, at § 5331(a), as to pay rates for General Schedule positions, and at § 5342(a)(1)(F), as to pay rates for "blue collar" employees.

[14]The precise holding of *Pittman* was that CIA had not surrendered its right to adopt regulations in conflict with personnel practices governing the classified service by announcing an intention to abide by Classification Act practices insofar as practicable.

mulgated that regulation solely as an implementation of section 102(c) of the National Security Act of 1947. Thus, H.R. 20-27(a) purports to authorize separations only in accordance with the authority granted the Director in section 102(c). The substantive provisions of the regulation establish only procedures whereby the Director can make the formal determination required by section 102(c), namely, that a termination is "necessary or advisable in the interests of the United States." The statute itself, not the regulation, overrides all other limitations on executive removal authority.

This explicit reliance on the statutory authority of section 102(c) is not weakened by the reference to other provisions of the National Security Act of 1947 and the CIA Act of 1949 in H.R. 20-27(a). While there may be cause for the exercise of unreviewable dismissal power where the termination involves special responsibilities of the Director,[15] we submit the Director cannot exercise such power for terminating surplus personnel where security interests are not involved.

The issue herein is whether the personnel actions contemplated by H.R. 20-27 exceeded statutory authority. The proper inquiry is the intent of Congress. The decision below allows the Director to expand statutory authority by regulation. If Congress had intended to give the Director

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[15]The National Security Act of 1947, § 102(d)(3), 50 U.S.C. § 403(d)(3) (1976), specifically charges the Director with protecting intelligence sources and methods from unauthorized disclosure. It could reasonably be said that section 102(c) is necessary to give the Director the final say in deciding whether to continue employment which poses a threat to the secrecy of intelligence sources and methods.

regulatory power to decide how to use section 102(c) dismissal authority, it could have done so.[16]

Section 102(c) is limited on its face to termination "in the interests of the United States." By exercising that authority to terminate surplus personnel, CIA expands the meaning of this language and makes deeper inroads on the safeguards prescribed by Congress in the Veterans' Preference Act. If CIA is free to exercise the power it claims here, any Congressional limitation can be removed by executive fiat.

CONCLUSION

The questions raised herein affect all CIA employees. They are of decisive importance to the hundreds of already-discharged employees who like petitioners were separated as "surplus to the Agency." Many of these discharged employees are still within the six-year limitations period for bringing suit. *See Star* article, *supra,* p. 4. The claims of a large percentage of them are adversely affected by the decision below.[17]

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[16] *See, e.g.*, the Foreign Service Act of 1946, as amended, 22 U.S.C. § 1008 (1976), which states: "Notwithstanding the provisions of this or any other law, the Secretary [of State] may, *under such regulatons as he may prescribe,* terminate at any time the services of any Reserve officer or staff officer or employee serving under limited appointment, except that, if the termination is because of misconduct, the provisions of section 1007 of this title shall be applicable." (emphasis added).

[17] 28 U.S.C. § 1491 (1978 Supp.) gives the Court of Claims jurisdiction of all monetary claims against the United States for wrongful termination of federal employment; 28 U.S. § 1346(a)(2) (1978 Supp.) gives concurrent jurisdiction to the district court of claims against the United States not exceeding $10,000.00. Because of the monetary limitation on district court juridiction, a claim for back pay and allowances in excess of $10,000.00 is within the exclusive jurisdiction of the Court of Claims.

The decision below will permit the virtual cashiering of any CIA employee at any time the Agency decides to reduce manpower levels. Moreover, a dismissal under section 102(c) ("in the interests of the United States") is at best dishonorable – if words have any meaning. Such a dismissal may permanently cripple the victim's reputation and earning capacity. Executive authority to work such consequences, in derogation of normal government procedures prescribed by law, should not be implied.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

In The United States Court of Claims

No. 276-79C

MAURICE E. BAKER	)	
LAWRENCE F. DAUM	)	
ELTURINO L. LOIACONO	)	
OLIVER W. PERRY	)	CIA; civilian pay;
WESLEY A. WRIGHT, JR.	)	National Security Act
THOMAS E. YOUNG	)	of 1947; authority of
	)	Director of the CIA
v.	)	
	)	July 18, 1980
THE UNITED STATES	)	

James J. Bierbower, attorney of record, for plaintiffs.

Sandra P. Spooner, with whom was *Assistant Attorney General Alice Daniel,* for defendant, *R. Bruce Burke,* Central Intelligence Agency, of counsel.

Before *FRIEDMAN, Chief Judge, NICHOLS* and *SMITH, Judges*

ORDER

These claims by former employees of the Central Intelligence Agency (CIA) for back pay and other collateral and incidental relief are before the court on defendant's motion for summary judgment and dismissal of the petition. Without oral argument and upon consideration of the submissions of the parties, some of which have been examined *in camera,* we grant defendant's motion.

Prior to their separation each of the plaintiffs was employed in essentially administrative work in a directorate of the CIA. None of them was engaged in foreign intelligence gathering or espionage activities. Each received a memorandum written notice pursuant to H.R. 20-27b(1)[1] declaring him excess to the manpower requirements of his directorate.

Plaintiffs Wright and Young, pursuant to H.R. 20-27b(2), appealed to the Director of Personnel of the CIA, who reviewed their appeals and recommended termination of employment. Pursuant to H.R. 20-27b(4) Wright and Young then appealed to the Director of the CIA, who reviewed their appeals and then terminated their employment, pursuant to H.R. 20-27b(5)(b), effective as to Young on July 7, 1973, and as to Wright on July 8, 1973.

Plaintiffs Baker, Perry, Daum, and Loiacono received similar notices pursuant to H.R. 20-27b(1) but did not utilize the appeal procedures provided by H.R. 20-27b(2) *et seq.* Two of the plaintiffs retired; effective June 29, 1973, as to Baker, and effective June 30, 1973, as to Perry. The other two plaintiffs resigned; effective June 30, 1973, as to Daum, and effective October 25, 1974, as to Loiacono.[2]

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[1]Headquarters Regulation (H.R.) 20-27 (rev. 31 Mar. 1970), entitled "Separation of Surplus Personnel," promulgated by the CIA to establish procedures by which any of its employees could be "declared excess to the manpower requirements of his directorate" and terminated under the authority of section 102(c) of the National Security Act of 1947, *as amended,* 50 U.S.C. § 403(c) (1970).

[2]Plaintiff Loiacono's notification of determination as excess was dated January 31, 1974; the order plaintiffs were notified in or around March 1973.

Plaintiffs base their claims for monetary and other relief on allegations that the CIA wrongfully and illegally used section 102(c) of the National Security Act to terminate employees for reasons other than in the interest of national security. Thus, plaintiffs allege, failure to use other normal procedures of termination under authority available to the CIA as well as to other agencies of the Government violated contract and property rights of plaintiffs and wrongfully deprived them of preferences, privileges, and considerations to which they were entitled under the provisions of other laws, including the Veterans' Preference Act of 1944, *as amended,* and U.S. Civil Service Commission regulations thereunder.

Defendant in its answer raises affirmative defenses that (1) plaintiffs who retired or resigned have failed to exhaust their administrative remedies and therefore are barred; (2) all of the plaintiffs have inexcusably delayed prosecuting their claims to the prejudice of defendant and are barred by the equitable doctrine of laches; (3) all of the plaintiffs have failed to state a claim within the jurisdiction of this court; and (4) all of the plaintiffs have failed to state a claim upon which relief may be granted.

In our order of June 22, 1979, in *Pittman* v. *United States,* Ct. Cl. No. 41-78, we stated that:

> * * * The CIA, because of its unique and specialized functions, was granted by Congress the authority to formulate its own personnel policies consistent with those unique needs of the Agency. * * *

We are unable to agree with plaintiffs' assertion that section 102(c) of the National Security Act of 1947 applies only when a personnel action is necessary or advisable in the interest of national security, nor can we agree that this issue has never been litigated. We conclude that plaintiffs

have failed to state a claim upon which relief may be granted, for the reason that the scope of section 102 and a predecessor regulation was raised and broadly interpreted in *Rhodes* v. *United States,* 156 Ct. Cl. 31 (1962). In the opinion in that case, Judge Laramore stated, at page 36.

> * * * [C]learly this statute and regulation gave the Director of the Central Intelligence Agency the absolute right to terminate any employee whenever he deemed it necessary or advisable. * * *

Plaintiffs' claims are not materially different from those denied by this court in the *Rhodes* case. That being so, we find it unnecessary to comment upon the other defenses raised by defendant.

IT IS THEREFORE ORDERED that defendant's motion for summary judgment is granted, and the petition is dismissed.

BY THE COURT

Daniel M. Friedman
Chief Judge

July 18, 1980

In The United States Court of Claims

No. 276-79C

MAURICE E. BAKER, ET AL

v.

THE UNITED STATES

Before FRIEDMAN, *Chief Judge,* NICHOLS and SMITH, *Judges*

ORDER

This case comes before the court on plaintiffs' motion, filed August 1, 1980, for rehearing *en banc* pursuant to Rules 7(d) and 151(b) with reference to the order entered herein on July 18, 1980. Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b),

IT IS ORDERED that plaintiffs' said motion for rehearing be and the same is denied.

BY THE COURT

Daniel M. Friedman
Chief Judge

Oct 3-1980

National Security Act of 1947, § 102(c), 50 U.S.C. § 403(c) (1976):

> (c) Notwithstanding the provisions of section 7501 of title 5, or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission.

* * *

5 U.S.C. § 3502 (1976) (amended 1978) (originally enacted as Veterans' Preference Act of 1944, ch. 287, § 12, 58 Stat. 390):

§3502. Order of retention.

(a) The Civil Service Commission shall prescribe regulations for the release of competing employees in a reduction in force which give due effect to—

(1) tenure of employment;
(2) military preference, subject to section 3501
(a)(3) of this title;
(3) length of service; and
(4) efficiency or performance ratings.

In computing length of service, a competing employee—

(A) who is not a retired member of a uniformed service is entitled to credit for the total length of time in active service in the armed forces;

(B) who is a retired member of a uniformed service is entitled to credit for—

(i) the length of time in active service in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized; or

(ii) the total length of time in active service in the armed forces if he is included under section 3501(a)(3)(A), (B), or (C) of this title; and

(C) who is an employee in or under the Department of Agriculture is entitled to credit for service rendered as an employee of a county committee established pursuant to section 590h(b) of title 16, or of a committee or an association of producers described in section 610(b) of title 7.

(b) A preference eligible employee whose efficiency or performance rating is "good" or "satisfactory" or better than "good" or "satisfactory" is entitled to be retained in preference to other competing employees. A preference eligible employee whose efficiency or performance rating is below "good" or "satisfactory" is entitled to be retained in preference to competing nonpreference employees who have equal or lower efficiency or performance ratings.

* * *

CIA Headquarters Regulation, H.R. 20-27, revised March 31, 1970 (rescinded 1977):

27. SEPARATION OF SURPLUS PERSONNEL. The procedures by which an Agency employee may be declared excess to the manpower requirements of his directorate or independent office, declared surplus to the Agency and his employment thereafter terminated are set forth in this paragraph.

a. AUTHORITY. The National Security Act of 1947, as amended, specifically charges the Director of Central Intelligence with the protection of intelligence sources

and methods. To this end, section 6 of the Central Intelligence Agency Act of 1949, as amended, provides that the Agency shall be exempted from the provisions of any law which require the publication or disclosure of names, official titles, salaries, or numbers of personnel employed by the Agency. Inasmuch as normal government procedures prescribed by law require such disclosures, the Director of Central Intelligence has determined that the termination of employees declared surplus pursuant to this paragraph will be affected pursuant to the authority granted him in section 102(c) of the National Security Act of 1947, as amended, which provides that notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555; 5 U.S.C. 652), or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he small deem such termination necessary or advisable in the interests of the United States. Therefore, the procedures governing terminations of employees declared surplus shall be those set forth below exclusively, and no employee in this category shall be entitled to consideration under procedures set forth in any other law or regulation, including the Veterans' Preference Act of 1944 (5 U.S.C. 851), as amended, or the United States Civil Service Commission regulations promulgated thereunder. Such termination shall not affect the right of the employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission.

b. POLICY AND ADMINISTRATION

(1) When a Deputy Director or Head of an Independent Office determines that an employee is excess to the manpower requirements of his directorate or independent office, he shall so declare the employee excess and notify the employee in writing of such action. In making this determination he shall take into consideration the current and anticipated manpower requirements of his directorate or independent office as well as the employee's performance, nature of service, qualifications, and grade.

(2) The Deputy Director or Head of an Independent Office shall forward any declaration made pursuant to subparagraph b(1) above to the Director of Personnel who shall inform the employee in writing of his right to submit within 10 days a request to be heard orally by an appropriate officer of the Office of Personnel or to state in writing to the Director of Personnel why he should not be declared excess to his directorate or independent office or to provide any other information he deems relevant. After appropriate review including consideration of any statements or any information provided by the employee, the Director of Personnel may request the Deputy Director or Head of an Independent Office to reconsider the declaration of an employee as excess.

(3) The Director of Personnel shall review the qualifications and background of an employee declared excess to the manpower requirements of a directorate or independent office with a view toward placing him elsewhere in the Agency at the same or different grade. As part of this review process, the employee shall be interviewed

by an appropriate officer of the Office of Personnel.

(4) If the Director of Personnel is unable to assign elsewhere in the Agency an employee who has been declared excess to the manpower requirements of a directorate or independent office, he shall recommend to the Director of Central Intelligence that the Director of Central Intelligence (a) declare the employee surplus to the Agency; (b) terminate the employee's employment, utilizing his authority under section 102(c) of the National Security Act of 1947, as amended; and (c) establish the effective date of such termination. The Director of Personnel shall notify the employee in writing of this action and of the employee's right to present through the Director of Personnel to the Director of Central Intelligence within 10 days any information in writing concerning why his employment should not be terminated and any other information he deems relevant.

(5) Upon receipt of a recommendation by the Director of Personnel to declare an employee surplus to the Agency, to terminate his employment, and to establish the effective date of such termination, the Director of Central Intelligence may take one or more of the following actions:

(a) Refer the recommendation to the Inspector General, who shall consider it and forward his own recommendation to the Director of Central Intelligence.

(b) Declare the employee surplus to the Agency, terminate his employment pursuant to section 102(c) of the National Security Act of 1947, as amended, and establish the effec-

tive date of such termination. Such effective date shall be not less than 30 days after the Director of Central Intelligence has taken action to terminate his employment.

(c) Disapprove in whole or in part the recommendation of the Director of Personnel.

(6) The Director of Personnel shall notify the employee in writing of the decision of the Director of Central Intelligence.

(7) The provisions of this paragraph do not limit in any way the authority of the Director of Central Intelligence under section 102(c) of the National Security Act of 1947, as amended, and as implemented by HR 20-28. Further, this paragraph shall not affect the responsibility and authority of the Director of Central Intelligence to remove, demote, or reassign any employee whose conduct or performance warrants such action.

No. 80-1095

In the Supreme Court of the United States

OCTOBER TERM, 1980

MAURICE E. BAKER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1095

MAURICE E. BAKER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners are six former employees of the Central Intelligence Agency whose employment with the agency terminated in 1973 and 1974 (Pet. App. 1a-2a). Their separations were part of a 1973 reduction in force designed to affect approximately 700 excess CIA employees. The CIA terminated petitioners' employment pursuant to Headquarters Regulation 20-27 (rev. 31 Mar. 1970), which was promulgated under the authority of Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c) (Pet. App. 2a n.1). That statute empowers the Director of Central Intelligence, "[n]otwithstanding the provisions * * * of any other law," to terminate in his discretion "the employment

of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States * * *."

In June 1979, almost six years after their separation from service, petitioners filed this suit in the United States Court of Claims, seeking back pay and incidental relief. Petitioners claimed that Section 102(c) applies solely to the termination of national security risks. Because they were terminated as surplus personnel, petitioners argued that they are entitled to the protections of the Veterans' Preference Act of 1944, 5 U.S.C. 3502, which would otherwise be preempted by Section 102(c). In July 1980, the Court of Claims granted the government's motion for summary judgment, rejecting petitioner's narrow construction of Section 102(c) (see Pet. App. 1a-4a). The Court of Claims observed that Section 102(c) has been "broadly interpreted" and that " 'this statute and regulation g[i]ve the Director of the Central Intelligence Agency the absolute right to terminate any employee whenever he deem[s] it necessary or advisable' " (Pet. App. 4a, quoting *Rhodes* v. *United States*, 156 Ct. Cl. 31, 36, cert. denied, 371 U.S. 821 (1962)). On October 3, 1980, the Court of Claims denied petitioners' motion for rehearing en banc (Pet. App. 5a).

2. Petitioners contend (Pet. 6-18) that Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), applies solely to the dismissal of CIA employees on national security grounds. The Court of Claims correctly rejected that claim, and its decision is consistent with the uniform view of the lower courts and does not conflict with any decision of this Court. Accordingly, further review is unwarranted.

The provisions of Section 102(c) are sweeping, expressly investing the Director of the CIA with "discretion" to terminate the employment of any officer or employee "whenever he shall deem such termination necessary or advisable in the interests of the United States." Nothing in the broad

language or legislative history of Section 102(c) suggests that the Director may exercise his discretion solely with regard to national security risks.[1] Accordingly, and consistent with the CIA's longstanding administrative practice, the lower courts have repeatedly concluded that, regardless of whether an employee is a national security risk, the Director has "broad discretion [under Section 102(c)] to terminate employees in the interest of the United States." *Torpats* v. *McCone*, 300 F. 2d 914, 915 (D.C. Cir.), cert. denied, 371 U.S. 886 (1962). See, *e.g.*, *Rhodes* v. *United States*, *supra*, 156 Ct. Cl. at 36.[2]

Moreover, petitioners' narrow construction of Section 102(c) would undermine the congressional purpose informing that statute and the National Security Act as a whole. In order to ensure an effective CIA, Congress empowered the Director to make personnel decisions without regard to other employment laws such as the Veterans' Preference Act. Petitioners, on the other hand, would require the Director

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[1]Petitioners acknowledge (Pet. 11 n.6) that "the published hearings, committee reports, and floor debates" on Section 102(c) offer no support for their position. Instead, they rely (Pet. 10-11) on the current recollection of an individual who allegedly was present during one of several non-public committee sessions regarding the Act, which were held in 1947. In addition, petitioners rely on statements made regarding the so-called McCarran Rider, passed by Congress a year earlier, which concerned the State Department's authority to terminate employees. These statements are entitled to no weight as to the meaning of Section 102(c), and may not, in any event, override the plain meaning of the Act.

[2]*Cole* v. *Young*, 351 U.S. 536 (1956), is not to the contrary. That case involved the construction of the Act of August 26, 1950, ch. 803, 64 Stat. 476, which gave various agencies the authority to dismiss employees "in the interest of the national security." Section 102(c), in contrast, concerns the CIA alone, and empowers the Director to terminate employment "whenever he shall deem such termination necessary or advisable in the interests of the United States * * * ." 50 U.S.C. 403(c).

to establish a national security basis for any personnel decisions taken pursuant to Section 102(c). Such a requirement would limit the flexibility of the Agency and would interfere with the secrecy that is essential to the CIA's operations. Indeed, this litigation itself has resulted in the compromise of one classified document, the creation of another, and the divulgence of still other classified information concerning a CIA employee. See Defendant's Reply to Plaintiffs' Response to Defendant's Motion For Summary Judgment at 9 n.4.

In addition, petitioners' interpretation of Section 102(c) would harm the interest of past, current, and future CIA personnel. The Director of the CIA has long concluded that Section 102(c) authorizes the termination of personnel on any rational ground. Such a dismissal bears no stigma for the dismissed employee. In fact, Section 102(c) expressly provides that "such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government * * * ." 50 U.S.C. 403(c). Petitioners, on the other hand, would require the Director effectively to declare any employee dismissed pursuant to Section 102(c) to be a national security risk—a result that Congress apparently sought to avoid.[3]

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[3]We further note, as we argued in the court below, that petitioners' belated claims for six years' back pay are barred by laches. See, *e.g.*, *Brundage* v. *United States*, 504 F. 2d 1382, 1384 (Ct. Cl. 1974). Furthermore, petitioners Baker, Perry, Daum and Loiacono have no claim against the Agency since they either retired or resigned and thus were not involuntarily separated from service, and since they failed to exhaust their administrative remedies. In light of its construction of Section 102(c), the Court of Claims did not address these points.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1981

DOJ-1981-03